

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,
Appellant/Cross-Respondent,

vs.

AMERICAN BROADCASTING
COMPANIES, INC.; THE ASSOCIATED
PRESS; CABLE NWES NETWORK,
INC.; CHESAPEAKE MEDIA I, LLC,
D/B/A KSNV-TV; LOS ANGELES
TIMES COMMUNICATIONS, LLC;
THE NEW YORK TIMES COMPANY;
SCRIPPS BROADCASTING
HOLDINGS, LLC; WP COMPANY,
LLC, D/B/A THE WASHINGTON POST,

Respondents,

LAS VEGAS REVIEW-JOURNAL,
Respondent/Cross-Appellant.

Electronically Filed
Jan 14 2019 01:36 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO.:
75518

**RESPONDENT/CROSS-APPELLANT LAS VEGAS REVIEW-
JOURNAL'S OPPOSITION TO APPELLANT/CROSS-RESPONDENT'S
MOTION TO STRIKE APPENDICES AND STAY BRIEFING**

APPEAL FROM EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY
THE HONORABLE STEFANY MILEY, DISTRICT JUDGE
DISTRICT COURT CASE NOS.: A764030; A764169

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I. INTRODUCTION

Appellant/Cross-Respondent the Las Vegas Metropolitan Police Department (“Metro”) has filed a motion asking this Court to strike the bulk of the Las Vegas Review-Journal’s (“Review-Journal”) Respondent/Cross-Appellant’s Appendix and disregard the citations to that appendix in the Review-Journal’s Answering Brief and Opening Brief on Cross-Appeal. (Motion, pp. 1, 3.) However, given that the documents included Review-Journal’s Appendix are necessary to support the Review-Journal’s assertion that Metro’s claims are moot and are also necessary to respond to specific factual and legal arguments raised by Metro, the Court should deny Metro’s Motion to Strike.

Metro raises three claims in its Opening Brief: (1) that the district court erred in requiring it to produce body worn camera (“BWC”) footage rather than requiring the Review-Journal and the Media Coalition to inspect the footage (OB, pp. 19-23); (2) that the district court erroneously limited Metro’s request to charge the Review-Journal and the Media Coalition fees for “extraordinary use” of personnel or resources pursuant to NRS 239.055 (OB, pp. 24-35); and (3) that the district court erred in allowing the Review-Journal and the Media Coalition to pay for the costs it did permit Metro to charge over a six month period. (OB, pp. 35-36.)

In its Answering/Opening Brief, the Review-Journal asserts that Metro’s decision to make BWC footage and other records available to the public free of

charge and its decision to not provide the costs estimates required by the district court's March 9, 2018 order regarding costs (the "Costs Order") rendered its entire appeal moot. (AB/OB, pp. 5, 23-30). To support this contention, the Review-Journal included documents which were filed with the district court after Metro filed its notice of appeal in this case.

Additionally, to respond to Metro's argument that the district court erred in failing to consider the costs associated with producing BWC footage to the Review-Journal and the Media Coalition (collectively, the "Media Parties"), the Review-Journal included in its Appendix communications between Metro and the Media Parties (all of which are part of the district court record) which demonstrate that the Media Parties made multiple efforts to coordinate with Metro to narrow requests and limit the costs to all parties, and that Metro repeatedly rebuffed those efforts. (See AB/OB, pp. 17-19 (discussing efforts to narrow requests).)

Metro also asks this Court in its Opening Brief to hold that NRS 239.055 allows it to charge the Media Parties for time expended by its personnel in redacting records. (See OB, pp. 26, 31-32.) In responding to this argument, the Review-Journal included in its Appendix a district court order from another matter which rejected a similar claim made by another governmental entity. (See 1RA001-22; *see also* AB/OB, p. 49, n.21 (citation to order).) Although the district court order is not

binding on this Court¹, it is a judicially noticeable document which may of persuasive value to the Court in considering Metro's claims.

II. ARGUMENT

A. Review-Journal Properly Included Judicially Noticeable Facts in Its Appendix.

Pursuant to NRS 47.150, this Court may take judicial notice of facts “generally known or capable of verification from a reliable source.” *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). To qualify as “judicially noticeable,” the facts cited by a party must be “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.” NRS 47.130(2)(b).

All the documents in the Review-Journal's Appendix Metro objects to are judicially noticeable. The bulk of the Appendix is an appendix of exhibits included with its May 18, 2018 Motion for Order to Show Cause, Request to Issue Sanctions, and Request for Emergency Status Check on Order Shortening Time. (See 1RA026-3RA421.) The remaining documents were minutes from the February 7, 2018 hearing on the Media Parties' Amended Petitions (1RA023-25), and a district court order in another public records matter, *Karen Gray v. Clark County School District*,

¹ See *Camreta v. Greene*, 563 U.S. 692, 709 (2011) (noting that a decision of a district court judge is “not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case”).

et al., Eighth Judicial District Court Case No. A543861. (1RA01-22.)

Metro does not dispute that any of these documents are judicially noticeable. Instead, with respect to the exhibits to the Motion to Show Cause, Metro is apparently attempting to sidestep dealing with facts that demonstrate its claims are moot by arguing that the bulk of the documents in the Review-Journal's appendix pertain to communications that took place after Metro filed its notice of appeal.² (Motion, p. 3.)

For the reasons discussed below, however, the Review-Journal included those documents to support its assertion that Metro's claim that the district court erred in directing it to produce BWC footage directly to the Review-Journal and the Media Coalition. The Review-Journal also included documents from the Motion for Order to Show Cause in its Respondent's Appendix to directly respond to factual allegations from Metro about the costs associated with producing the BWC footage.

As for the district court order in the *Gray* case, the Review-Journal included that order to rebut Metro's claim that it should be permitted to charge the Review-

² Metro's assertion is partly inaccurate. Although the exhibits to the Motion for Order to Show Cause included in the Review-Journal's Respondent's Appendix were submitted to the district court after Metro filed its March 30, 2018 notice of appeal (7AA001332-34) and include communications which took place after that date, several of the exhibits are correspondence sent to or received from Metro *before* the March 30, 2018 notice of appeal. (See 1RA030-036 (exhibits 1, 2, and 3 to Motion for Order to Show Cause).)

Journal a fee for extraordinary use for personnel costs it incurs redacting records. (See AB/OB, pp. 48-49 (responding to arguments in pages 26 and 31-32 of Metro’s Opening Brief).) Specifically, Metros claims that the district court erred in not permitting it to charge the Media Parties fees for “extraordinary use” under NRS 239.055 for the time expended by its personnel in redacting records. (OB, pp. 30-32.) In order to fully respond to Metro’s arguments regarding the scope and application of NRS 239.055, the Review-Journal determined it was necessary to include a district court order in another public records matter which discusses why barring governmental entities from charging a fee for redaction encourages better public records management. Thus, the Court should deny Metro’s request to strike this document from the Review-Journal’s Respondent’s Appendix.

B. The Nevada Rules of Appellate Procedure Do Not Bar Submission of the Judicially Noticeable Documents in Review-Journal’s Appendix.

The Review-Journal acknowledges that Nevada Rule of Appellate Procedure 30 outlines the materials which *must* be included in appendices to appellate briefs. Nothing in the rule, however, bars a party from including documents which may be necessary to the Court’s resolution of the issues on appeal. Indeed, NRAP 30(b)(4) contemplates that a respondent may include in its appendix “those documents necessary to rebut appellant’s position on appeal which are not already included in

appellant's appendix.”³ Because the Review-Journal determined during the course of preparing its Answering Brief and Opening Brief on Cross-Appeal that Metro's Appellant's Appendix did not include documents which are necessary to rebut Metro's factual and legal claims, the Review-Journal properly included documents from the district court record below and a judicially noticeable order from another public records matter.

C. The Appendix Documents Regarding Metro's Actions After Filing a Notice of Appeal Are Necessary to Support the Review-Journal's Mootness Argument.

Standing, mootness, and ripeness are jurisdictional issues that may be raised at any time, even for the first time on appeal. *See, e.g., Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003); *accord DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006). This Court's case law recognizes that events may occur after the filing of a notice of appeal which moots an appellant's claims. *See, e.g., Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (holding that “even though a case may present a live controversy at its beginning, subsequent events may render the case moot”) (citations omitted). Because Metro has taken certain actions after the filing of its notice of appeal which the Review-Journal asserts has mooted its appellate claims, the Review-Journal

³ Metro also cites to Nevada Rule of Appellate Procedure 10(a). (Mot., p. 1) Rule 10(a), however, simply defines what constitutes a “trial court record,” and does not prohibit inclusion of the documents included in the Review-Journal's Appendix.

properly submitted an appendix which includes documents that support its factual and legal assertions regarding mootness.

As discussed above, Metro claims the district court erred in directing it to produce the BWC footage rather than requiring the Media Parties to inspect the footage because the redaction process is too complex and burdensome. (OB, pp. 19-23.) In its Answering Brief/Opening Brief, the Review-Journal asserts that Metro's claim has been mooted by Metro's own actions; specifically, the Review-Journal asserts this claim is moot because Metro unilaterally decided to make BWC footage generally available free of charge to any media entity that wants them, regardless of whether they were a party to the district court action. (AB/OB, p. 25-27.)

To support this assertion, the Review-Journal included in its Answering Brief/Opening Brief documents filed with the district court which demonstrate that Metro's mass dissemination of BWC footage after it filed its March 31, 2018 notice of appeal mooted its claims. (*See* 1RA030-3RA421; *see also* AB/OB, pp. 19-21 (discussing specific documents in appendix regarding Metro's mass dissemination of records).) Given that mootness is a claim that can be raised at any time and given that the Review-Journal is required to support its claim of mootness with specific facts⁴, the inclusion of documents in its Appendix from the May 18, 2018 Motion

⁴ *See, e.g.*, NRAP 28(a)(10)(A) (requiring that arguments in appellate briefs must contain a party's "contentions and the reasons for them, with citations to the

for Order to Show Cause was appropriate.

D. The Appendix Documents Are Necessary to Rebut Metro's Factual Assertions Regarding the Production of BWC Footage.

In its Opening Brief, Metro relies on a self-serving declaration from one of its employees regarding the estimated time and expense associated with redacting the BWC footage to support its argument that redacting the records would be too costly and time-consuming. (OB, pp. 13-15.) However, Metro fails to acknowledge that counsel for the Media Parties repeatedly offered to work with Metro to narrow requests and limit costs for all parties. Thus, the Review-Journal included documents in its Appendix which specifically demonstrate the Media Parties' efforts to assist Metro in reducing the costs associated with production of the BWC footage. (See 1RA31-33; 1RA40; 1RA65(communications regarding efforts to work with Metro to reduce costs).)

E. The Cases Cited by Metro in Its Motion to Strike Are Inapposite.

Metro cites only three cases in support of its request that this Court strike the Review-Journal's Respondent's Appendix and ignore certain portions of the Answering Brief/Opening Brief on Cross-Appeal—*Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 635 P.2d 276 (1981), *State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 370 P.2d 672 (1962), and *Arnold v. Kip*, 123 Nev. 410, 168

authorities and parts of the record on which the [party] relies”).

P.3d 1050 (2007). (See Mot., pp. 1, 2, 3.) None of these cases, however, foreclose the Review-Journal's submission of an appendix which includes judicially noticeable documents and documents filed with the district court after Metro submitted its notice of appeal.

In *Carson Ready Mix*, this Court considered whether the appellant had preserved its objections to the trial court's jury instructions as required by NRCP 51. *Carson Ready Mix*, 97 Nev. at 475, 635 P.2d at 276. Although the appellant asserted that it had complied with Rule 51 "by raising specific objections and citing relevant authority to the court below during a conference in the judge's chambers," these objections were not included in the record on appeal. *Id.*, 97 Nev. at 475, 635 P.2d at 277. In response to a motion to dismiss filed by the respondent, appellant submitted an affidavit from trial counsel and proposed instructions that were not part of the court record. *Id.* This Court rejected the appellant's arguments, holding that "[t]he attempt by appellant's counsel to supply the missing predicate for appellate review by affidavit and by a document not appearing in the record is of no avail. We cannot consider matters not properly appearing in the record on appeal." *Id.*, 97 Nev. at 476, 635 P.2d at 277.

The issue here is not whether either party failed to properly preserve issues for appellate review. Instead, as discussed above, one of the central issues raised in the Review-Journal's Answering Brief/Opening Brief is that Metro's actions after

the entry of the two orders on appeal mooted its appellate claims. Thus, the inclusion of documents which tend to demonstrate Metro's claims are now moot is not prohibited under *Carson Ready Mix*.

Another case cited by Metro—*State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 370 P.2d 672 (1962)—also does not support its argument that the Review-Journal's appendix materials should be stricken. In that case (which, unlike this matter was a writ proceeding rather than a direct appeal), this Court struck an improper affidavit submitted by the respondent that criticized petitioner's counsel and the merits of the petition. *State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 178, 370 P.2d 672, 673 (1962). Here, in contrast, as detailed above, the Review-Journal is providing the Court with judicially noticeable information that is “necessary to rebut appellant's position on appeal.” Nev. R. App. P. 30(b)(4). Accordingly, the Court should deny Metro's request to strike the Review-Journal's Respondent's Appendix.

The final case cited by Metro—*Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007)—is also inapposite. In that case, the Court was asked to consider whether arguments made for the first time in a motion for reconsideration are properly considered on appeal from the final judgment. *Arnold*, 123 Nev. at 416, 168 P.3d at 1054. Again, that is not the issue here. Rather, the issue is whether Metro's actions after the entry of the two orders at issue rendered its appellate claims moot. Because events subsequent to the filing of a notice of appeal can render an appeal moot, this

Court can and should consider the documents in the Review-Journal's Appendix which go directly to the Review-Journal's mootness argument.

F. The Court Should Deny Metro's Request for a Stay of the Briefing Schedule.

At the end of its Motion, Metro asks the Court to stay the briefing and extend the deadline for submitting its Reply and Answering Brief on Cross-Appeal pending resolution of the Motion.⁵ (Mot., p. 3-4.) The Court should deny this request. Metro has not provided this Court with any explanation as to *why* it cannot file its Reply and Answering Brief while the Court is deciding its Motion. Indeed, Metro has not even identified specific portions of the Review-Journal brief that rely on the allegedly improper documents included in the Review-Journal's Appendix. Absent some demonstration that replying to the Review-Journal's Answering Brief/Opening Brief on Cross-Appeal while this Motion is pending will actually prejudice Metro, the Court should deny the request.

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⁵ Although Metro asserts in its Motion that its reply Brief is due January 4, 2019 (Motion, p. 3), the docket for this case indicates Metro's Reply Brief is due January 7, 2019.

III. CONCLUSION

For all these reasons, the Review-Journal respectfully requests this Court deny Metro's Motion to Strike.

DATED this 27th day of December, 2018.

/s/ Alina M. Shell

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT/CROSS-APPELLANT LAS VEGAS REVIEW-JOURNAL'S OPPOSITION TO APPELLANT/CROSS-RESPONDENT'S MOTION TO STRIKE APPENDICES AND STAY BRIEFING was filed electronically with the Nevada Supreme Court on the 27th day of December, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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